

89-292 (1)

No. _____

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ESTATE OF JACK GILPIN

Petitioner,

v.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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August 21, 1989

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QUESTION PRESENTED

Whether the judgment and opinion of the court of appeals should be vacated because the case has become moot by the unilateral action of the respondent union several weeks prior to the filing of the petition for a writ of certiorari?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were:

Plaintiffs: Jack Gilpin (now deceased), Stephen A. Petrilli, Jerome [Jeanne] A. Dietrich, Margaret E. Dailey, Sandra S. Coe, Karen Hirstein, Ray Anderson, Gail Mueller [Micheletta], and Scott Mauck.¹

Defendants: American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"); and in their official capacities,² Roland Burris, Comptroller of the STATE OF ILLINOIS; Richard McClure, Director of the ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES; Gregory L. Coler, Director of the ILLINOIS DEPARTMENT OF PUBLIC AID; Edward Duffy, Director of the ILLINOIS DEPARTMENT OF ALCOHOLISM AND SUBSTANCE ABUSE; David W. Hardwick, Director of the ILLINOIS DEPARTMENT OF VETERAN'S AFFAIRS; Larry Werries, Director of the ILLINOIS DEPARTMENT OF AGRICULTURE; Brad Evilsizer, Director of the ILLINOIS DEPARTMENT OF MINES AND MINERALS; Gregory W. Baise, Director of the ILLINOIS DEPARTMENT OF TRANSPORTATION; Bernard J. Turnock, Director of the ILLINOIS DEPARTMENT OF PUBLIC HEALTH; Michael B.

¹In light of the recent decisions of *Torres v. Oakland Scavenger Co.*, __ U.S. __, 108 S. Ct. 2405 (1988); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988); this petition is filed only on behalf of the Estate of Jack Gilpin, whose decedent was, in retrospect, the only appellant in the court of appeals.

²The real party in interest in an official-capacity suit is the entity represented and not the individual office holder. *Karcher v. May*, 484 U.S. 72, 108 S. Ct. 388, 393 (1987); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

Witte, Director of the ILLINOIS DEPARTMENT OF CONSERVATION; John E. Washburn, Director of the ILLINOIS DEPARTMENT OF INSURANCE; James B. Zagel, Director of the ILLINOIS DEPARTMENT OF LAW ENFORCEMENT; J. Thomas Johnson, Director of the ILLINOIS DEPARTMENT OF REVENUE; Michael Fryzel, Director of the ILLINOIS DEPARTMENT OF FINANCIAL INSTITUTIONS; Mike Woelffer, Director of the ILLINOIS DEPARTMENT OF COMMERCE AND COMMUNITY AFFAIRS; Terry Lash, Director of the ILLINOIS DEPARTMENT OF NUCLEAR SAFETY; Michael Belletire, Director of the ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES; Gary L. Clayton, Director of the ILLINOIS DEPARTMENT OF REGISTRATION AND EDUCATION; Michael P. Lane, Director of the ILLINOIS DEPARTMENT OF CORRECTIONS; Gordon Johnson, Director of the ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES; Janet Otwell, Director of the ILLINOIS DEPARTMENT OF AGING; Joyce E. Tucker, Director of the ILLINOIS DEPARTMENT OF HUMAN RIGHTS; Susan Suter, Director of the ILLINOIS DEPARTMENT OF REHABILITATION SERVICES; Dr. Donald Etchison, Director of the ILLINOIS DEPARTMENT OF ENERGY AND NATURAL RESOURCES; Sally Ward, Director of the ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and Richard Carlson, Director of the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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AMERICAN FEDERATION OF STATE, COUNTY
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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner, Estate of Jack Gilpin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on May 24, 1989, and that said judgment and opinion in the above-entitled case be vacated and remanded with instructions to dismiss the cause as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950).

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") 1a) is reported at 875 F.2d 1310. The district court's first opinion, entered on July 30, 1986 (App. 13a), is reported at 643 F. Supp. 733.³ The district court's last two unreported opinions, entered on June 29, 1987, and June 14, 1988, are reproduced at App. 24a; 30a.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1989. This petition is being filed within ninety days from the date the judgment sought to be reviewed, vacated and remanded was rendered. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner's decedent, Jack Gilpin, appellant below, and eight other nonunion employees, all of whom were employed by Illinois state and local agencies, were subject to a collective bargaining agreement, entered into pursuant to Illinois law, requiring them to pay compulsory agency fees to the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") as a condition of employment. By law, AFSCME was required to certify the amount of such compulsory fees, and the State then deducted the fees from the employees' paychecks, remitting the amounts collected to AFSCME.

The nine nonunion employees brought suit in September 1985 to contest the collection of such

³None of the parties appealed from the first opinion.

compulsory fees.⁴ After some preliminary hearings and rulings, the district court on July 30, 1986, determined that a "notice" concerning the fees, sent by AFSCME to employees in 1985, and the procedures for challenging the fees, were constitutionally defective under *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (App. 13a). The next notice, sent by AFSCME in 1986, was also found to be constitutionally defective by Order entered June 29, 1987 (App. 24a). About three years after the case was filed, the district court finally ruled that a 1987 version of the notice was constitutionally sufficient (App. 30a).

Notwithstanding its previous findings of constitutional violations, the court determined there were no damages, denied restitution of fees for the two years the notice was found constitutionally defective, denied certification of a class for a second time, and dismissed the case (App. 30a). Jack Gilpin appealed.⁵

Jack Gilpin raised four issues on appeal which the court of appeals said "merit discussion" (875 F.2d at 1313; App. 4a). They were whether the district court: (1) should have certified the suit as a class action; (2) should have issued a preliminary injunction against collection of the 1985 fees; (3) should have ordered restitution of fees collected in 1985 and 1986; and (4) should have, as it did, found the 1987 notice adequate.⁶ Nonetheless, the court of appeals rejected all four issues and "dismissed [the

⁴Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343, 2201-02 and 42 U.S.C. § 1983.

⁵See note 1, *supra*, at ii.

⁶Gilpin also raised in his brief the issue whether, at least, nominal damages should have been awarded for the adjudicated constitutional violations. The court of appeals did not discuss this issue.

appeal] insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction [and o]therwise . . . affirmed [the judgment]." (875 F.2d at 1316-17; App. 12a.)

SUGGESTION OF MOOTNESS

While it is probably rare for the petitioner to suggest mootness, nevertheless, this Court has reminded counsel that they have a duty to inform the Court of any development that would suggest mootness. *See Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); *cf. Honig v. Students of California School for the Blind*, 471 U.S. 148, 152 (1985) (Marshall, J., dissenting).

"When a claim is rendered moot while awaiting review by this Court," *Deakins v. Monaghan*, 484 U.S. 193, 108 S. Ct. 523, 528 (1988), it falls upon the petitioner to suggest that the cause is moot. Such is the case here.

The prospective equitable issues and requested relief became moot upon Jack Gilpin's recent death. However, the issue of restitution⁷ still existed because union dues and fees had been automatically deducted from Jack Gilpin's salary during the two years the district court had determined the necessary constitutional procedures for such collections were absent.

Then, a month before this petition for certiorari was due, AFSCME unexpectedly and unilaterally sent

⁷The court of appeals' denial of restitution conflicts with the allowance of restitution by the Sixth Circuit and the Ohio Supreme Court when the required *Hudson* safeguards are absent. *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Gibney v. Toledo Federation of Teachers*, 40 Ohio St. 3d 152 (1988).

petitioner and the other eight nonunion plaintiffs checks in amounts that exceeded the amount of restitution petitioner had planned to request this Court to order.⁸

Petitioner has accepted this payment as complete settlement of all outstanding claims. Consequently, there no longer is a live controversy between the parties, nor any questions that can affect the rights of the litigants in this case, nor the concreteness and kind of adversariness which assures a presentation with requisite diligence and fervor that is necessary for a Federal court to decide a case. *See Deakins*, 108 S. Ct. at 528; *Preiser v. Newkirk*, 422 U.S. 395, 461 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Sibron v. New York*, 392 U.S. 40, 57 (1968).

REASONS FOR GRANTING THE WRIT

Since the issues in this case are now moot, this Court should grant the Estate of Jack Gilpin's petition for a writ of certiorari, vacate the judgment and opinion of the court of appeals, and remand with instructions to dismiss the cause as moot.

When events occurring after the court of appeals has decided a case but before the Supreme Court has acted on a petition for certiorari have, as here, eliminated any possibility that the Court's order may grant meaningful relief affecting the controversy that precipitated the litigation, it is the duty and established practice of this Court to grant the petition for writ of certiorari, vacate the

⁸Rather than the 1% of the amount deducted in 1986, which the court of appeals noted AFSCME had promised to return and upon which the court based its denial of any additional restitution (875 F.2d at 1312, 1313-15; App. 3a, 6a-7a), AFSCME returned 120% of that year's deduction!

decree below and remand the cause with directions to dismiss the complaint as moot. *Onwuasoanya v. United States*, ____ U.S. ___, 109 S. Ct. 299 (1988); *Deakins*, 108 S. Ct. at 526-29 & nn. 4&5; *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979); *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Munsingwear*, 340 U.S. at 39-41; *Commodity Futures Trading Commission v. Chicago Board of Trade*, 701 F.2d 653, 656-57 (7th Cir. 1983); Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731, 745-49.

One of the reasons for vacating the lower court's decision when the case becomes moot during the appeal process is to ensure that a decision, of which the losing party, the Estate of Jack Gilpin, was denied appellate review because of happenstance and the unilateral action of the winning party below, will not have a preclusive effect in subsequent litigation. The Court also vacates lower court decisions that subsequently become moot because such interim findings lack the stamp of reliability that comes from surviving appellate review. *Id.* Both reasons are applicable herein.

CONCLUSION

For the foregoing reasons, it is therefore respectfully submitted that the Court should grant the petition for writ of certiorari, vacate the judgment and opinion of the court of appeals, and remand with instructions to dismiss the cause as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted,

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